

<p>Reeves v 1710 Broadway, LLC</p>
<p>2012 NY Slip Op 30200(U)</p>
<p>January 30, 2012</p>
<p>Supreme Court, Queens County</p>
<p>Docket Number: 17023/06</p>
<p>Judge: Allan B. Weiss</p>
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

KEVIN REEVES,

Plaintiff

-against-

1710 Broadway, LLC and C & K REAL
PROPERTIES, LLC, AT&T WIRELESS
SERVICES, INC., and CHRISTIAN
CASEY, LLC

Index No: 17023/06

Motion Date: 10/12/11

Motion Cal. No: 26,27,28

Motion Seq. No.: 5,6,7

Defendants.

1710 Broadway, LLC and C&K REAL
PROPERTIES, LLC,

Third-party Plaintiffs,

-against-

STARBUCKS CORPORATION,

Third-party Defendant.

The following papers numbered 1 to 40 read on this motion by defendants/third-party plaintiffs 1710 Broadway, LLC (1710 Broadway) and C&K Real Properties, LLC (C&K) pursuant to CPLR 3212 for summary judgment dismissing all claims and cross claims and granting summary judgment for contractual indemnification against the defendant Christian Casey, LLC (Christian Casey); on the order to show cause by the defendants/third-party plaintiffs 1710 Broadway and C&K for an order precluding the plaintiff's neuropsychiatrist Daniel Kuhn and life care planner Ed Provder from testifying at trial, or alternatively, staying the trial of this action and compelling the plaintiff to appear at a further examination before trial and defense examinations conducted by a neuropsychiatrist and life care planner designated by 1710 Broadway and C&K, staying the trial until 1710 Broadway and C&K's motion for summary judgment is decided, and compelling the plaintiff to serve

properly executed and acknowledged HIPAA complaint authorizations and to serve an authorizations for his treating psychiatrist Dr. Smith; on the motion by the plaintiff for an order precluding all defendants from obtaining a neuropsychiatric IME and post-discovery EBT of plaintiff, precluding all defendants from obtain copies of plaintiff's IRS records, employment records for 7/11, the "July 4, 2001 accident" and college records, issuing a protective order precluding defendants from being able to obtain confidential records of the plaintiff and precluding a further IME and depositions, striking the defendant Christian Casey's answer or in the alternative striking its affirmative defense for failure to serve a verified bill of particulars, precluding defendants 1710 Broadway and C&K from offering the testimony of Joseph Cannizzo, PE at trial, precluding defendant Christian Casey from offering testimony of Denise Bekaert (an architect) at trial, precluding all defendants from offering the testimony of vocational rehabilitation specialist Peter Capotosto, Dr. Jeffrey Spivak, M.D., and David Yamins, M.D. for failure to provide detailed reports of their findings within 45 days pursuant to CPLR 3121(b), and to unify the liability and damages portion of the trial; and on the cross motion by the defendants 1710 Broadway and C&K to compel plaintiff to appear at a further deposition and to provide HIPAA complaint authorizations to obtain all records regarding the diagnosis of and treatment for HIV/AIDS, to compel plaintiff to appear at a further deposition and to provide HIPAA complaint authorizations to obtain all of plaintiff's medical records, diagnostic films, and the non-privileged legal-file arising out of his July 4, 2001 motor vehicle accident, to compel plaintiff to provide authorizations and copies of plaintiff's employment records from 7-11, IRS records and Medicaid records, and to stay the trial of this action to allow 1710 Broadway and C&K the opportunity to obtain and analyze these records and conduct plaintiff's deposition.

Papers
Numbered

Order to Show Cause - Affidavits - Exhibits.....	1-5
Notice of Motion - Affidavits - Exhibits.....	6-16
Notice of Cross Motion - Affidavits - Exhibit....	17-20
Answering Affidavits - Exhibits.....	21-34
Reply Affidavits.....	35-40

Upon the foregoing papers it is ordered that the order to show cause, motion and cross motion are determined as follows:

This is a negligence action to recover money damages for injuries that were allegedly suffered as a result of a slip and fall that occurred on December 27, 2004, in the staircase leading to the basement of the building located at 1710 Broadway, New York, NY (the Building). The defendant 1710 Broadway was the owner of the Building and C&K was the managing agent. The defendant Christian Casey was a tenant in the Building that leased the second through sixth floors of the Building.

The plaintiff alleges that he slipped and fell on water while descending the stairs leading to the basement. The plaintiff further alleges that the water was caused to leak down on the stairs from a divot in the sidewalk that allowed the water to seep into the vestibule and into the stairwell between the vestibule and basement.

The portion of the motion to compel the plaintiff to provide HIPAA compliant authorizations relating to the diagnosis and treatment of the plaintiff for HIV/AIDS and has been resolved by stipulation. The portion of the motion by the plaintiff to strike the affirmative defenses of the defendant Christian Casey and to strike or preclude Christian Casey's expert has been withdrawn.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). An out-of-possession landlord is not liable for injuries that occur on the premises unless it retains control of the premises or is contractually obligated to perform repairs and maintenance (see *Seney v Kee Assoc.*, 15 AD3d 383 [2005]; *Knipfing v V & J*, 8 AD3d 628 [2004]). Where a landlord reserves a right of entry for inspection and repair, liability may be imposed for injuries caused by a dangerous condition only where liability is based on a specific statutory provision and there is a significant structural or design defect (see *Ingargiola v Waheguru, Mgt.*, 5 AD3d 732 [2004]). The defendants failed to establish their *prima facie* entitlement to summary judgment. While the defendants 1710 Broadway and C&K focus on who had the responsibility to maintain the staircase, there is an issue of fact as to whether the accident was caused by the divot in the sidewalk. Pursuant to 7-210 of the Administrative Code of the City of New York, the landlord has a statutory duty to maintain the sidewalk abutting its premises and is also responsible for the removal of snow and ice (see *Harakidas v City of New York*,

86 AD3d 624 [2011]; *James v Blackmon*, 58 AD3d 808 [2009]). Furthermore, under the lease with Christian Casey, 1710 Broadway and C&K were responsible for the snow removal and maintenance of the sidewalk in front of the building. There is also an issue of fact raised in deposition testimony as to whether the practice of shoveling snow towards the building caused the melting snow to leak through the divot and then to drip onto the staircase. Additionally, there is issue of fact raised from the course of conduct of the parties as to who was responsible for maintaining the staircase in question (see *Winby v Kustas*, 7 AD3d 615 [2004]). The evidence revealed that defendants 1710 and C&K hired a contractor to place treads on the steps in the stairwell and paid for their installation. Therefore, summary judgment is not warranted.

In light of the discussion above, in which 1710 Broadway and C&K were unable to establish, *prima facie*, that the accident was not a result of their negligence, the defendants/third-party plaintiffs 1710 Broadway and C&K are not entitled to summary judgment on their claim for contractual indemnification from the defendant Christian Casey (see *Astarita v Flintlock Constr. Servs., LLC*, 69 AD3d 888 [2010]; *Reynolds v County of Westchester*, 270 AD2d 473 [2000]).

The Court next turns to the discovery issues raised in the defendants' order to show cause, the plaintiff's motion and the defendants' cross motion. This action was commenced on August 3, 2006. The defendants 1710 Broadway and C&K in their order to show cause seek to compel a further independent medical examination of the plaintiff by an neuropsychiatrist, or in the alternative to preclude the testimony of Dr. Daniel Kuhn or any mention of traumatic brain injury. The plaintiff, has moved to preclude such discovery. The defendants argue that the plaintiff has alleged a new injury, a claim for a traumatic brain injury, which was first revealed in Dr. Kuhn's records. The plaintiff, however, has given notice of the neurological nature of his injuries as early as October 25, 2006, in his bill of particulars. The bill of particulars described symptoms of brain injuries including, "numbness on the left side of the cranium, loss of cognitive function, cerebral concussion and post-concussion syndrome with resultant headaches, memory loss, vertigo, difficulty sleeping, inability to concentrate and cognitive difficulties." These descriptions of cognitive deficit in the bill of particulars were more than just generalities and were the exact symptoms that describe a traumatic brain injury and were enough to give notice of such a claim. Furthermore, the plaintiff has had to have his deposition taken five times due to memory problems and the inability to stay awake during depositions. In fact, during a

deposition, the plaintiff testified that he hit his head during the alleged accident and has suffered resulting loss of memory. Furthermore, the plaintiff testified to his treatment with Dr. Kuhn in the portions of his deposition that occurred in September 2010. Additionally, information that the plaintiff was treated by Dr. Kuhn, a neuropsychiatrist was included in the Worker's Compensation Records. The defendants had access to these records from 2009 and forward and had continuing authorizations to obtain those records. The defendants, are therefore not entitled to an order of preclusion or to any further medical examination of the plaintiff.

The Court next turns to the request in the cross motion for the production of further records. This Court stated in its May 12, 2011 decision denying the motion to strike the note of issue, in which many of the same discovery requests were made, that the parties had more than adequate time to complete pretrial proceedings and further discover in this case is not warranted. The defendants have now moved again for further discovery requests. The defendants are not entitled to these further discovery requests made on the eve of the trial. All discovery requests have previously been resolved by prior order or should have been resolved in the lengthy pretrial proceedings. The defendants have not established that they are entitled to any further discovery.

In light of the determination denying further discovery, the branch of the cross motion to stay the trial pending further discovery is denied.

The branch of the plaintiff's motion to preclude the testimony of the defendants' 1710 Broadway and C&K's expert engineer is denied. This branch of the motion should be brought in limine before the assigned trial justice. In any event, the fact that the inspection took place nearly five years after the commencement of the action is not determinative (see *Oboler v City of New York*, 8 NY3d 888 [2007]). Furthermore, the plaintiff never served a notice of rejection or objected to 1710 Broadway and C&K's expert witness response.

The plaintiff further moves to preclude the economic experts of the defendants. The branch of the plaintiff's motion to preclude various experts is denied. The defendants have included the experts' reports in their cross motion. Preclusion is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice (see *Johnson v Greenberg*, 35 AD3d 380 [2006]). Plaintiff has not made a showing of either willful failure to disclose or any prejudice.

The branch of the plaintiff's motion to unify the liability and damages portions of the trial is denied. The general rule in the Second Department is that bifurcation is the preferred method for personal injury negligence trials (see *Barrera v Skaggs-Walsh, Inc.*, 279 AD2d 442 [2001]). Here, the nature of the injury does not have an important bearing on the issue of liability and, therefore, a unified trial is not warranted (see *Wahid v Long Is. R.R. Co.*, 59 AD3d 712 [2009]).

Accordingly, the motion by the defendant 1710 Broadway and C&K for summary judgment dismissing the complaint and all cross claims and for summary judgment on their claim for contractual indemnification against the defendant Christian Casey is denied.

The order to show cause by the defendants 1710 Broadway and C&K for an order of preclusion or, in the alternative, to seek a further medical examination of the plaintiff, and to stay the trial is denied.

The branches of the plaintiff's motion to preclude further discovery is granted. The branches of the plaintiff's motion to preclude the testimony of the various expert witnesses and the branch of the motion to unify the liability and damages portion of the trial are denied.

The cross motion by the defendants 1710 Broadway and C&K to compel further discovery and staying the trial pending further discovery is denied.

Dated: January 30, 2012

J.S.C.